As to the plaintiff, the Chief Justice said :—

> I think that the whole trouble is due to these facts: the plaintiff knew Frisco was paid on a percentage basis; he imagined that defendants' profits to be very much greater than they were; and he had succeeded without great difficulty in extracting substantial compensation for the week's delay when his first fight was postponed. He therefore thought that if he demanded more he would get it.

Whether he was right in so thinking again may be open to argument. As to the case as a whole the Chief Justice said :—

> The plaintiff is very positive that he was never offered this fight, but I am satisfied that he was offered the fight;

and later :—

> I find it impossible to believe that the defendants broke the contract. Apart from this evidence that it was the plaintiff who broke it, it was to their interest to try and get some return for the expense which they had incurred in bringing the plaintiff to Singapore. A second fight would probably have made some profit though not so large a profit as the plaintiff seemed to think; so why should the defendants not provide that fight?

I think, particularly having regard to the finding as to the letters, that the Chief Justice must have decided the case upon the impression which the witnesses made upon him.

Much argument was directed to showing that Frisco was not willing or available to fight at the material time; but it does not seem to me that that necessarily carries the matter any further. When they made their offer to the plaintiff, the respondents might have hoped that they could make arrangements with Frisco, and as to this the Chief Justice said :—

> But the plaintiff does not say that he was offered a fight with Frisco which for some reason or other the defendants were unable to stage. If that was his story it would carry more weight.

In the result I think that the Chief Justice decided this case upon the impression which the witnesses made upon him when they gave their oral evidence; and that being so, I do not think that we shall interfere; and the appeal should be dismissed.

Aitken, J. A. : — I concur, and have nothing to add.

Worley, J. : — I also concur and have nothing to add.

Appeal Dismissed.

F. M. S. REPORTS.

KUPPUSAMY vs. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Murray-Aynsley, J.) Sept. 26, 1941]

Discharge of accused not amounting to an acquittal —Criminal Procedure Code (Cap. 6), sections 171, 173, 254 and 302 (v).

Proceedings had been instituted upon the complaint of a person under section 133 of the Criminal Procedure Code (Cap. 6) against the appellant. The complainant appeared at the hearing and asked for an adjournment. The Magistrate discharged the appellant but directed that the discharge should not amount to an acquittal. Against this order the appellant appealed.

Held, that except in cases coming within the special order under section 254 of the Criminal Procedure Code (Cap. 6) a Magistrate cannot acquit an accused person until the evidence for the prosecution has been heard.

Appeal from an order of the Magistrate at Tapah.

Cases referred to :—

(1) *Abdullah v. Public Prosecutor* [1933-1934] F.M.S.L.R. 360.

(2) *Regina v. Monterio* 4 Ky. 556.

Mahendran for appellant :—

The refusal of the complainant to proceed with her case coupled with the absence of her witnesses, if any, and who further had not been subpoenaed empowered the Magistrate to dismiss the charge against the appellant. By such dismissal the complainant would be deprived of any right to proceed against the defendants on the same charge. See **Abdullah v. Public Prosecutor**(1), **Regina v. Monterio**(2). The order of the Magistrate which was "discharge not amounting to an acquittal" is not recognised by any of the relevant sections of the Criminal Procedure Code and was therefore "**ultra vires**".

Russell, Deputy Public Prosecutor, for respondent.

Cur. Adv. Vult.

Murray-Aynsley, J. : — In this case the complainant was not ready with her evidence and asked for an adjournment.

The Magistrate made an order that the defendants should be discharged "without amounting to an acquittal".

Against this order one of the defendants appeals. It is contended on his behalf that he should be acquitted. It seems that a Magistrate may in a case make the following orders (a) he may find the person guilty; (b) he may acquit the accused; (c) he may discharge the accused; or (d) in cases under section 254 order a discharge amounting to an acquittal. The present case does not come under section 254.

By section 302 (v) the dismissal of a complaint or the discharge of the accused is not an acquittal for the purposes of this section.

Section 254 (ii) provides such discharge shall not amount to an acquittal unless the Court so directs, except in cases coming under section 171. Such discharge means, however, discharge under section 254. Therefore for a discharge to amount to an acquittal without a special order of the Magistrate it must fall within the provisions of section 254 as well as of section 171.

Section 173 deals with the whole procedure of summary trials. Sub-sections (f) and (m) provide for the cases where the Magistrate may acquit the accused. (g) and (n) provide for the discharge for the accused.

I have been unable to find any circumstances which permit a Magistrate to "dismiss" a charge. The deplorable index of the laws does not refer to either "discharge" or "dismissal". I think it is clear that the earliest stage at which a Magistrate can acquit an accused person is after hearing all the evidence for the prosecution.

Therefore the Magistrate could not have acquitted in the present case, nor could he have awarded a discharge which amounted to an acquittal.

The appeal therefore fails.

Appeal Dismissed.

LOK YIN vs. PAT THOO.

[Original Civil Juris. (Cussen, J.) August 6, 1941]

Damages — Loss of expectation of life — Claim by plaintiff — Executors (Powers) and Fatal Accidents Enactment (Cap. 19), section 4 (1) — Civil Law Enactment No. 3 of 1937, section 4.

The Court in the Federated Malay States in seeking to estimate the sum to be given in damages for the loss of expectation of life under section 4 of the Civil Law Enactment No. 3 of 1937 should not adopt the scale of award made in similar cases in England but should adopt the attitude of mind exemplified by the award of the House of Lords in **Benham v. Gambling**(1) and give expression to it in fixing the amount to represent the loss of prospective happiness to a person in this country.

Suit tried before Cussen, J.

The plaintiff claimed damages on behalf of himself and his wife, the father and mother of a young man named Lok Soo who was killed by the negligence of the defendant. Liability was admitted and the only question in dispute was the amount of damages to be awarded.

B. J. P. Joaquim for plaintiff :—

Liability has been admitted and the only questions for decision are the amount of damages and their adjustment having regard to the circumstances.

As regards the method of calculation of damage under the Executors (Powers) and Fatal Accidents Enactment, see **Yam binti Baba v. Loy Chim**(2) and **Yee Kong v. Teh Seng**(3).

As regards the measure of damages for loss of expectation of life, the decision of the House of Lords in **Benham v. Gambling** (1) has completely revised the earlier view.

The earlier cases show that damages in the neighbourhood of £1,000 would be appropriate, but the House of Lords in **Benham v. Gambling**(1) laid down the general principle that damages should be moderate, and assessed them at £200 in respect of a child aged 2½ years.

The House of Lords also laid down that damages for an infant would normally be less than the damages for an adult who had established himself in life. On this basis, the damages in this case should be something in excess of £200. Money in Malaya is of no greater value than it is in England: in following the basis laid down by the House of Lords English pounds should be converted into their equivalent in dollars.

As regards the adjustment of the two sets of damages, it is clear that a dependant should not be paid twice over. His damages for loss of support caused by the death of the person supporting him must be mitigated by what he receives as beneficiary of the estate of that person. **Ellis v. Raine**(12) and **Yelland v. Powell Duffryn Collieries**(13).

The damages for loss of expectation of life belong to the estate and do not go entirely to the beneficiaries; funeral and administration expenses must first be paid out of the estate. These, therefore, should be taken into consideration when dealing with the amount by which the damages under the Executors (Powers) and Fatal Accidents Enactment are mitigated by the benefit received from the deceased's estate, **Feay v. Barnwell**(5).

W. G. W. Hastings for defendant :—

Since the decision of the House of Lords in **Benham v. Gambling**(1), awards for damages in these cases have been much reduced.

It is submitted that it is not a sound principle in assessing these damages to follow exactly the amount given in English cases. The social structure is different out here.

Social considerations must be taken into account — see the judgment of Scott, L.J., in **Ellis v. Raine**(6) at page 183. This man would earn in a month what an English miner would earn in a week. Howes, J., in **Yee Kong v. Teh Seng**(3) awarded $1,000 to a woman of the same age as the deceased in this case and that was before the decision in **Benham v. Gambling**(1) was reported.

It is not competent for the Court to take into account administration expenses. It is clear they cannot be claimed as damages — see **Rose v. Ford**(4) in the speech of Lord Wright. The point was not argued before Singleton, J. These expenses are necessary before the plaintiff becomes entitled to sue because imposed by law. In this case administration was taken out for the sole purpose of bringing this suit but in many cases they are necessary apart from a claim of this kind.

Cases referred to :—

(1) *Benham v. Gambling,* (1941) A.C. 157.
(2) *Yam binti Baba v. Loy Chim,* (1938) F.M.S.L.R. 322; (1939) M.L.J. 242.
(3) *Yee Kong v. Teh Seng,* (1940) F.M.S.L.R. 256; (1941) M.L.J. 58.
(4) *Rose v. Ford* (1937) A.C. 826.
(5) *Feay v. Barnwell,* (1938) 1 A.E.R. 31.
(6) *Ellis v. Raine* (1939) 2 K.B. 180.
(7) *Yelland v. Powell Duffryn Collieries* (1941) 1 A.E.R. 278.

Cussen, J. : — A young man named Lok Soo was run down on 12th October, 1940, by a motor lorry owned by the defendant, and died shortly after the accident.

The plaintiff is the father of Lok Soo and has taken out letters of administration to his estate.

The plaintiff now sues the defendant for damages resulting from the death of Lok Soo.

Liability is admitted and the only matter for the Court to determine is the amount to be given as damages. Claims are made under two distinct heads:

(1) A claim is made under section 4 (1) of the "Executors (Powers) and Fatal Accidents Enactment"